MOTION FILED

MAR 18 1987

No. 86-870

(7)

In The Supreme Court of the United States

October Term, 1986

PHILLIPS PETROLEUM COMPANY, AND
CINQUE BAMBINI PARTNERSHIP

PETITIONERS

VERSUS

STATE OF MISSISSIPPI AND
SAGA PETROLEUM U.S., INC.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MOTION AND MEMORANDUM IN SUPPORT OF THE MOTION BY THE STATE OF MISSISSIPPI FOR DISMISSAL OF WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

ROBERT FRANKLIN SPENCER
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)

KATHY D. SONES
SPECIAL ASSISTANT ATTORNEY GENERAL

POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE: (601) 359-3680

JEAN R. SWIFT
15 ELLERY LANE
WESTPORT, CONNECTICUT 06880

ATTORNEYS FOR RESPONDENT
STATE OF MISSISSIPPI

21 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

PAGE:

MOTION BY THE STATE OF MISSISSIPPI FOR DISMISSAL OF WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES..... 1

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES..... 5

CERTIFICATE OF SERVICE..... 16

TABLE OF AUTHORITIES

Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935).. 10

Cinque Bambini Partnership, et al v. State of Mississippi, et al, 491 So.2d 508, 516 (Miss. 1986).. 2

City of Galveston v. Menard, 23 Tx. 349 (1859)..... 14

Fulton Light, Heat & Power Co. v. State, 200 N.Y. 400, 94 N.E. 199 (1911)..... 14

Lorino v. Crawford Packing Co., 142 Tx. 51, 175 S.W.2d 410 (1943)..... 14

Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)..... 10

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845)..... 10

Schultz v. Wilson, 44 N.J. Supper. 591, 131 A.2d 415 (1957)..... 14

State v. Bayou Johnson Oyster Co., 130 La. 604, 58 So. 405 (1912).. 13

Wagner v. City of Baltimore, 210 Md. 615, 124 A.2d 815 (1956)..... 13

TABLE OF AUTHORITIES CONT'D

Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57 (1873)..... 10

Statutes:

Submerged Lands Act, 43 U.S.C. §1301, et seq..... 3

NO. 86-870

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,

PETITIONERS

versus

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO
THE SUPREME COURT OF MISSISSIPPI

MOTION BY THE STATE OF MISSISSIPPI FOR DISMISSAL OF WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES

1. On February 23, 1987, the Supreme Court of the United States granted Petitioners' request for a writ of certiorari to the Supreme Court of the State of Mississippi, to review the

decision of that court in the case of Cinque Bambini Partnership, et al v. State of Mississippi, et al, 491 So.2d 508 (Miss. 1986). In that case, the Mississippi Supreme Court held that effective upon statehood on March 1, 1817, the United States granted to the State of Mississippi in trust all lands to which the United States then held title (including their mineral and other subsurface resources) subject to the ebb and flow of the tide regardless of commercial navigability. The Mississippi court specifically held that certain tidelands in dispute, located in Hancock County, Mississippi, belonged to the State as part of the state-owned public trust.

2. Petitioners had posed the question to this Court "whether at the

time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust."

3. Respondent State of Mississippi respectfully calls the attention of the Court to the explicit language of the Submerged Lands Act, 43 U.S.C. Sections 1301-1315, passed by Congress on May 22, 1953. This Act was previously uncited to the Court by Respondent. Respondent State of Mississippi submits that certain provisions of this Act, i.e., Section 1301(a)(1), (2), (3) and Section 1311 (a) (1953) as discussed in the attached Memorandum in Support of this Motion, are determinative of the question posed to this Court by Petitioners and therefore

render consideration of such question moot.

4. The State of Mississippi, by its undersigned counsel, now moves the Court for dismissal of the Writ of Certiorari to the Supreme Court of Mississippi, as improvidently granted.

Respectfully submitted,

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

ROBERT FRANKLIN SPENCER
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

KATHY D. SONES
SPECIAL ASSISTANT ATTORNEY GENERAL

POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE: (601) 359-3680

JEAN R. SWIFT
15 ELLERY LANE
WESTPORT, CONNECTICUT 06880

ATTORNEYS FOR RESPONDENT
STATE OF MISSISSIPPI

BY: Robert Franklin Spencer
ROBERT FRANKLIN SPENCER

NO. 86-870

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,

Petitioners,

vs.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO
THE SUPREME COURT OF MISSISSIPPI

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES

In its decision in Cinque Bambini Partnership, et al v. State of Mississippi, et al, 491 So.2d 508, 516 (Miss. 1986), the Supreme Court of Mississippi held:

> ". . . [e]ffective upon statehood on March 1, 1817, we understand federal law to provide that the United States granted to the State of Mississippi in trust all lands, to which the United States then held title, including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then mean high water level -- regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea. Similarly granted were the beds and streams of all non-tidal waters which were navigable in fact in 1817. . . ."

That court also held specifically that certain tidelands in dispute located in Hancock County, Mississippi, belonged to the State as part of the state-owned public trust.

Petitioners applied to the United States Supreme Court for a Writ of Certiorari to review the above decision,

challenging the title of the State to all tidelands under the "ebb and flow test" of the common law. They posed the question to this Court:

> "Whether at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust."

The entire thrust of Petitioner's argument is that a distinction should be made between submerged lands which are navigable in fact, i.e., commercially navigable, and those which are navigable in the legal sense.

Congress clearly addressed this issue on May 23, 1953, when it passed 43 U.S.C. §1301, et. seq. (1953), commonly known as the Submerged Lands Act. At the time of the passage of the Act, there existed an imperative need to determine

whether the individual States or the United States Federal Government has ownership and control of the submerged lands, due to the increasing litigation between the United States and the several States concerning the development of natural resources, i.e., oil and gas off the coastline. The purpose of the Submerged Lands Act was to confirm and establish the rights and claims of the States to the lands and resources beneath navigable waters within their boundaries and extending offshore three miles.

43 U.S.C. 1301(a), (1953), explicitly identifies three distinct types of lands as lands within the definition of "lands beneath navigable waters." The Act states:

> "(a) The term 'lands beneath navigable waters' means--

"(1) All lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter modified by accretion, erosion, and reliction;

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

"(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;"
[Emphasis Added].

Significantly the wording of the Act shows that "lands beneath navigable water" were not being granted to the States in 1953, but that Congress was merely recognizing and confirming the States' pre-existing rights in such tidelands. With passage of the Submerged Lands Act, Congress merely codified the principles utilized to identify the trust property as previously set forth in more than thirty (30) United States Supreme Court decisions applying the "ebb and flow" common law test beginning with Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845); Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57 (1873); Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935). See

also, Legislative History, Appendix I, H.R. No. 17782, 83rd Cong., 1st Sess. 2, reprinted in 1953 U.S. Code Cong. and Admin. News. 1385, 1428-1429.

Consequently, under the Submerged Lands Act, the only test applicable to State ownership of tidelands is the common law "ebb and flow" test which terminates at the "mean high tide" mark. There is no mention by Congress of a "navigability-in-fact test" in tidal waters.

Ownership of all such tide lands up to the "mean high tide" mark is with the respective States as shown by 43 U.S.C. 1311(a), (1953):

> "It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and

> (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law . . . are . . . recognized, confirmed, established and vested in and assigned to the respective States . . . " [Emphasis Added]

The Submerged Lands Act previously was not cited to the Court by this Respondent. A portion of the Act was cited by Petitioner to highlight the State ownership of lands under "navigable waters," however, Petitioner failed to identify the parameters of the definition of "navigable waters" under the Submerged Lands Act.

Mississippi submits to the Court that the decision of the Mississippi Supreme Court below is in complete accord with the prior case law of this Court and subsequent Congressional Acts based upon such precedent as manifested by the Submerged Lands Act and its legislative

history. Additionally, the actions of Mississippi are in accordance with the actions of at least five other states which have analyzed the matter in legal controversies and subsequently determined that State ownership of the tidelands was determined by the "ebb and flow of the tide" up to the "line of the mean high tide." Each of the five states have spoken to this issue in the following cases: Louisiana in State v. Bayou Johnson Oyster Co., 130 La. 604, 58 So. 405 (1912) wherein Louisiana received the soil under the ebb and flow of the tide; Maryland in Wagner v. City of Baltimore, 210 Md. 615, 124 A.2d 815 (1956) where the Maryland court determined that the test of navigability is whether waters are subject to the ebb and flow of the tide; New Jersey, Schultz v. Wilson, 44

N.J. Super. 591, 131 A.2d 415 (1957) - the State has title to submerged lands without regard to navigability; in New York, Fulton Light, Heat & Power Co. v. State, 200 N.Y. 400, 94 N.E. 199 (1911), the State retained title to property subject to the ebb and flow of the tide; and in the State of Texas, City of Galveston v. Menard, 23 Tx. 349 (1859) and later in Lorino v. Crawford Packing Co., 142 Tx. 51, 175 S.W.2d 410 (1943), bays, inlets and other waters along the Gulf Coast subject to the ebb and flow of the tide are "navigable waters."

For the foregoing reasons, Mississippi respectfully prays that the Writ of Certiorari to the Supreme Court

of Mississippi be dismissed as improvidently granted.

Respectfully submitted,

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

ROBERT FRANKLIN SPENCER
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

KATHY D. SONES
SPECIAL ASSISTANT ATTORNEY GENERAL

POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE: (601) 359-3680

JEAN R. SWIFT
15 ELLERY LANE
WESTPORT, CONNECTICUT 06880

ATTORNEYS FOR RESPONDENT
STATE OF MISSISSIPPI

BY: Robert Franklin Sp
ROBERT FRANKLIN SPENCER

CERTIFICATE OF SERVICE

I, Robert Franklin Spencer, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date caused to be mailed, postage prepaid, a true and correct copy of the above and foregoing **MOTION BY THE STATE OF MISSISSIPPI FOR DISMISSAL OF WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES** and **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES** to the following:

Eugene Gressman
School of Law
University of North Carolina
Chapel Hill, N.C. 27514

Joel Blass
Mize, Thompson & Blass
Suite 310, Gulf National
Bank Building
Gulfport, MS 39502-0160

William G. Paul, General Counsel
John L. Williford
Elizabeth A. Harris
Legal Division, Phillips
Petroleum Company
1252 Adams Building
Bartlesville, Oklahoma 74004

Ed Harper
5th Floor 518 Building
518 E. Capital Street
Jackson, Mississippi 39201

Boyce Holleman
Boyce Holleman, P.A.
Post Office Drawer 1030
Gulfport, Mississippi 39501

Robert Marsel
2400 Westheimer
Houston, Texas 77098

This the 18th day of March, 1987.

Robert Franklin Spencer

ROBERT FRANKLIN SPENCER